

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE (PPA)  
PRODUCTS LIABILITY LITIGATION

MDL NO. 1407  
ORDER DENYING DEFENDANT'S  
MOTION TO COMPEL, TO EXTEND  
CASE-SPECIFIC DISCOVERY AND  
TO IMPOSE SANCTIONS

This document relates to:

*Stowe v. Bayer Corp.*, C04-2351

This matter comes before the court on a motion by defendant Bayer Corporation to compel, to extend the discovery deadline, and to impose sanctions. Having reviewed the briefs and exhibits filed in support of and in opposition to this motion, the court finds and rules as follows.

A. The "Condominium Claim"

Before the court is the latest in a series of discovery disputes. The first issue defendant raises is related to the so-called "condominium claim." The issue stems from a sentence included in plaintiff's December 29, 2005 supplemental fact sheet: "As a result of her injuries, Plaintiff has been forced to sell her condominium." Defendant submits that this new allegation entitles it

1 to further discovery on the economic loss (if any) relating to the  
2 sale of plaintiff's condo. Bayer made several requests that  
3 plaintiff clarify the nature and intent of her claim relating to the  
4 condominium sale, and argues to the court that plaintiff's responses  
5 have been equivocal and obfuscatory. Specifically, Bayer claims it  
6 still does not understand whether plaintiff intends to claim a loss  
7 on the sale of her property, or whether she merely intends to use  
8 the sale in relation to her emotional distress claim.

9 Plaintiff's approach to the so-called condominium claim,  
10 however, has been generally consistent; the sale of the condominium  
11 is related not to any economic loss Bayer caused her to incur in the  
12 sale, but is intended to buttress her claim of emotional distress.<sup>1</sup>

13 Any argument that plaintiff suffered economic loss from the  
14 sale of the condominium would be precluded by plaintiff's assertion  
15 that the claim "is not an economic loss issue; it is relevant to her  
16 emotional distress and diminished enjoyment of life claims," Motion  
17 at 3, citing exh. D, and that she is "making no claim of loss of  
18 money in connection with her sale of her condominium." *Id.*, exh. F.

19 To the extent Bayer is seeking discovery on the condominium  
20 sale as it relates to the emotional distress claim, Bayer has failed

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22 <sup>1</sup> Bayer's reading of plaintiff's responses on this issue is  
23 flawed. Plaintiff asserts in response to interrogatories that she  
24 "has relevant knowledge of her loss of income, and of the emotional  
25 distress and loss of enjoyment this sale has caused." The court does  
26 not, as Bayer would have it, read this as the same as "plaintiff has  
relevant knowledge of her loss of income . . . this sale has  
caused." Instead, the insertion of the comma after "income" and the  
use of the conjunctive phrase "and of..." indicate that the "loss of  
income" does not refer to the condominium sale. The court agrees  
with plaintiff that these two clauses are to be read separately.

1 to outline what additional information, if any, it needs. Further  
2 discovery on this issue is therefore unnecessary. More detrimental  
3 still to Bayer's position is that, while plaintiff disclosed the  
4 claim relating to the sale of her condo "for the first time" on  
5 December 29, 2005, discovery in this case was extended by court  
6 order until May 12, 2006. Defendant therefore had nearly five months  
7 to obtain discovery on the putative claim, including by filing a  
8 motion to compel.<sup>2</sup> The court's rules are clear: motions to compel  
9 must be filed before the discovery deadline. See Local Rule 16(f)  
10 ("Any motion to compel discovery shall [] be filed and served on or  
11 before [the discovery] deadline."). Bayer's request to compel on  
12 this issue is therefore denied.

13 B. Plaintiff's Requests for Admissions

14 Bayer's second complaint is that plaintiff has propounded  
15 improper requests for admission, and has subsequently failed to  
16 cooperate with Bayer's attempt to resolve the resulting  
17 disagreements. In particular, plaintiff sought agreement from Bayer  
18 that certain medical records were "presumptively valid." Instead of  
19 submitting the records to Bayer for review, however, plaintiff  
20 included synopses of the documents. Claiming it could not determine

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22 <sup>2</sup>While the issue was raised in a previous motion to compel  
23 filed in February 2006, Bayer itself acknowledges that "the issue  
24 was not fully before the Court" in that motion because Bayer was  
25 still "investigating the nature of this claim" when the motion was  
26 filed. Def. Rep. at 2. By March 2006 at the latest, however, Bayer  
acknowledges having all the information relevant to a motion to  
compel on the so-called condominium claim, and nearly three months  
of discovery remaining in which to seek any discovery it considered  
relevant to the sale. The instant motion, of course, was not filed  
until after the deadline lapsed.

1 first-hand the nature of the documents, Bayer refused to acknowledge  
2 their presumptive validity. In an attempt to resolve the issue,  
3 Bayer requested first informally and later by formal written  
4 discovery that plaintiff present the actual documents for review.  
5 Plaintiff did not respond to the requests except with a letter to  
6 defendant threatening sanctions. According to plaintiff, the  
7 requested documents had already been provided at an earlier stage of  
8 discovery, and she was under no obligation to resubmit them for  
9 defendant's convenience.

10 Bayer now asks the court to compel plaintiff to produce the  
11 documents. As the plaintiff herself points out, however, the burden  
12 fell to her to seek court intervention regarding the sufficiency of  
13 Bayer's responses; she chose not to do so. Moreover, plaintiff  
14 claims she had already provided the documents sought, a claim that  
15 defendant does not deny. Plaintiff's failure to respond to Bayer's  
16 discovery request therefore does not justify extending the discovery  
17 deadline and delaying this case further.

18 C. Health Care Providers

19 Finally, Bayer submits that in her requests for admission  
20 propounded on December 20, 2005, plaintiff disclosed two previously  
21 unidentified healthcare providers, Dr. Sam Sato and a Walgreens  
22 pharmacy located in Illinois. According to Bayer, plaintiff has been  
23 uncooperative in Bayer's subsequent attempts to ascertain any  
24 details relating to these providers, including the type of care  
25 provided and any records associated with them. In response,  
26 plaintiff submits that Dr. Sato is the records custodian for a prior

1 treating physician, and that the Illinois Walgreens is that  
2 company's corporate headquarters.

3 Bayer appears to be satisfied with plaintiff's response,  
4 seeking no further information regarding these entities in its  
5 reply. It does, however, raise an additional issue. Defendant claims  
6 that review of previously undisclosed Walgreens documents led to  
7 disclosure of yet another healthcare provider heretofore  
8 undisclosed: a Dr. J. Abbott. Defendant concurrently admits that as  
9 early as May 2003 it became aware of the identity of a healthcare  
10 provider "Jon T. Abbott" through its record retrieval service, which  
11 indicated erroneously (as apparently is common) that there were no  
12 records related to plaintiff. Defendant claims that it did not  
13 pursue the matter further because plaintiff had not indicated that  
14 she had been treated by a Dr. Abbott.

15 Plaintiff responds that the Walgreens documents were available  
16 to defendant as early as February 2002, and that defendant could  
17 have identified Dr. Abbott much sooner. She also claims she does not  
18 recall receiving treatment from Dr. Abbott.

19 While Bayer claims it has suffered prejudice from plaintiff's  
20 failure to disclose Dr. Abbott's name sooner, it is unclear what  
21 discovery, if any, Bayer is now seeking to compel.<sup>3</sup> The parties are  
22 apparently awaiting, or have already received, plaintiff's records  
23 from Dr. Abbott. If those records necessitate further discovery, the  
24 parties may at that time address any outstanding issues. In the

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26 <sup>3</sup>By the court's count Bayer has already met its ten-deposition  
limit, and makes no case for an exception.

1 meantime, however, discovery - which has already been extended once  
2 - is over. This case is ripe for remand.

3 Bayer's motion to compel and extend the discovery deadline is  
4 DENIED. The motion for sanctions, *a fortiori*, is also DENIED.

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6 DATED at Seattle, Washington, this 19th day of July, 2006.

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BARBARA JACOBS ROTHSTEIN  
United States District Court Judge

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